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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 20

EARLE & STODDART, INC., ET AL., PETITIONERS,

against

ELLERMAN'S WILSON LINE, LTD., OWNER AND OPERATOR OF THE STEAMSHIP "GALILEO", RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel for Petitioners.

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Respondent, instead of indicating any alleged inaccuracies in the statement of facts contained in our brief, has presented in its brief an entirely independent statement of facts. This new statement is full of

inaccuracies, and, indeed, presents a case which is essentially different from that stated in the courts below.

Respondent now abandons its main contention in the courts below that it was chief engineer Oxtoby's negligence in loading the new lot of 850 tons of coal for the steamer *Francisco,* and not the hot and gaseous condition of respondent's old bunker coal on the steamer *Galileo,* that caused the fire.

Under the title, "Statement of Facts", at page 3 of respondent's brief, it is said:

> "The fire in the 'Galileo's' bunkers concededly made the vessel unseaworthy. Any such fire in a ship, of course, renders a vessel 'unseaworthy' in the broad sense in which the term is sometimes used.
>
> The assertion frequently made in petitioner's brief that 'unseaworthiness' caused the fire is not accurate. The fire rendered the vessel unseaworthy."

And at page 5 of respondent's brief, under the same title, it is said:

> "In fact, a strong odor of coal gas, as a result of the combustion on the 'Galileo', was detected by Magarelli on a coal boat alongside the vessel (R. 331). The odor of coal gas proves that some of the coal had reached the ignition point" (R. 485).

And at page 9 of respondent's brief, it is said:

> "Concededly the 'Galileo' was unseaworthy *because of the fire.*"

And at page 21 of respondent's brief, discussing the *Walker* case, it is said:

> "This case disposes of any suggestion that an owner's defense under the Fire Statute depends on whether the fire is caused before or after the commencement of the voyage."

At page 30 of respondent's brief, it is said:

> "In precisely the same way, the Propeller 'Falcon' in *Walker* v. *Transportation Co.*, 3 Wall. 150, discussed at page 19 of this Brief, was also unseaworthy because of the neglect of the crew in allowing the fires to burn during the night while the propeller was lying at the wharf, and in leaving these dangerous fires burning without anybody to watch them."

And at page 31 of respondent's brief, it is said:

> "This court, therefore, in the *Walker* case specifically rejected the contention here made that a dangerous fire left on board a vessel through the negligence of the officers before the commencement of the voyage, and which causes the loss of the vessel, deprives the owner of the benefit of Section 1 of the Limited Liability Act of 1851, the so-called Fire Statute."

The uncontradicted evidence is that at the time that Magarelli detected the odor of coal gas "on the morning of August 25th" (Respondent's Brief, p. 5), which respondent argues "proves" that the fire then existed, the loading of the new lot of 850 tons of coal which the owners had ordered for another of their vessels, the Francisco (R. 589), had just commenced

(Respondent's Brief, p. 5). This is shown by the very page of the record (Record, p. 331) which is cited at page 5 of respondent's brief in support of the statement that Magarelli detected a strong odor of coal gas while on the coal boat alongside the vessel. Magarelli there says (R. 331):

> "Q. When you were speaking about the hold being warm, which lot of coal are you talking about, the coal that was already there, or the coal that you were going to put in?
>
> A. The coal that were in.
>
> Q. You mean the coal that was there before?
>
> A. Yes.
>
> Q. Was there any smoke you could see, or gas you could smell?
>
> A. I could smell the gas over the side, there was gas come on the coal boat."

Yet both courts below have found that it was the loading of the new coal by Oxtoby, and not any fire existing in the old coal, which was the cause of the loss. There is no support in the opinions below for respondent's statement that either court below found that fire was the proximate cause of the loss.

According to respondent's present contention, repeated throughout its brief, the negligence of Oxtoby in loading the new coal had nothing whatever to do with causing the fire or the unseaworthiness. Respondent now argues that the Galileo was unseaworthy to the point of being on fire before Oxtoby committed his alleged carelessness, and therefore that a previously-existing fire, and not Oxtoby's later negligence, was the proximate cause of the loss.

The District Judge was most positive in his findings that

> "Assuming the heated condition of part of the old coal, I am convinced that the new supply would have caused the fire in even a perfect bunker" (R. 587).
>
> "Unquestionably the immediate cause of the fire was the gross negligence of the ship's chief engineer in putting a new supply of coal on top of old coal that had become heated in the temporary bunker" (R. 582).
>
> "The 160 tons had been in it for almost two months, which is longer than would be expected, as the 'Galileo' was operated, *yet no fire occurred in it until it was covered with a new supply*" (R. 586).
>
> "Certainly the immediate cause was the gross negligence of the chief engineer in loading the new supply on top of the old coal which contained hot spots" (R. 587).
>
> "There remains for consideration the question whether respondent is liable on account of the unseaworthiness caused by the negligent act of the chief engineer in loading a new supply on the hot coal" (R. 587).
>
> "Concededly at the commencement of the voyage the 'Galileo' had within her a condition so dangerous that a bunker fire was inevitable and did in fact result within six hours" (R. 588).

On August 28, 1926, "at 12:50 P. M. the anchor was weighed and the vessel proceeded to sea" (R. 59). At 4:35, on August 28, 1926 (R. 59), within six hours after leaving New York, a fire broke out which was uncontrollable without help from shore (R. 62).

The Circuit Court of Appeals found that "Within six hours of her departure fire was discovered in the coal carried in a temporary bunker in No. 3 'tween deck" (R. 642). "The new coal was taken on a day or two before the 'Galileo' sailed, so that at the commencement of her voyage there existed within her, as the court expressly found, a condition so dangerous that a bunker fire was inevitable. Therefore, within authoritative definitions of seaworthiness (*The Sylvia*, 171 U. S. 462, 464; *The Southwark*, 191 U. S. 1, 9) the 'Galileo' was unseaworthy when she sailed and this was due to her chief engineer's negligence" (R. 642). These attacks by respondent itself on the decision of the Circuit Court of Appeals constitute additional ground for a reversal by this Court.

The record shows that at the time that respondent now contends that the fire existed (namely, when Magarelli detected the odor of coal gas on the morning of August 25) (Respondent's Brief, p. 5), a large and unspecified part of the petitioner's goods had not yet been loaded by the respondent on board the "Galileo." The log book of the "Galileo" (Respondent's Exhibit B, Record, pages 570-B, 570-C and 570-D) shows that the loading of cargo was not completed until 9:15 a. m. on August 28, 1926, and that the vessel left her berth at 10:17 a. m. on August 28, and discharged tugs and proceeded at 10:20 a. m. on August 28. It shows that the vessel was bunkering on August 24, 25 and 26, and completed bunkering at 4:00 p. m. on August 26, but that cargo was being

loaded on August 23, 24, 25, 26, 27 and 28. The log book preceding August 23, 1926, has never been produced by respondent. The record thus shows without contradiction that a large part of the petitioner's cargo was loaded on board the "Galileo" after the time at which respondent now argues the fire had broken out. In other words, counsel for respondent's present argument is in substance that a shipowner is protected by the fire statute even if he accepts goods on board his ship after he has reasonable means of knowledge that his ship is already on fire. The obvious answer to respondent's present argument is that, if the ship is on fire at the time the shipowner accepts the goods on board for carriage, any resulting fire damage to such goods is not legally caused by "fire," but by the negligent act of the shipowner in accepting them for carriage with reasonable means of knowledge that the ship is unfit and unseaworthy to carry them. A shipowner would obviously be negligent in permitting his ship to leave port with an observable fire on board, which was easily extinguishable in port but would, as here (R. 62), be impossible for the crew to extinguish while on the high seas. If the ship is observably ablaze before and at the time she leaves port, the corporate shipowner cannot escape liability because of the mere circumstance that it preferred to remain in England and let the duty of managing its business as a common carrier in the loading port be transacted by a subsidiary. The difference between a ship violently ablaze and a ship on fire as described by respondent on page 5 of its brief is only of degree.

Counsel for respondent do not argue in support of the decision of the Circuit Court of Appeals on the first point in petitioners' brief (at pages 16 to 57). The first point in petitioner's brief had nothing whatever to do with Chief Engineer Oxtoby's negligence (which is respondent's first point), nor with the personal nature of the respondent's contract (which is respondent's only other point). Petitioners' first point was that the failure of the respondent shipowner and ship operator to supply a vessel and coal which were seaworthy and safe from fire on sailing (so far as use of ordinary care by an ordinarily prudent shipowner or manager in the loading port could make them so) constituted negligence of the respondent personally as the common carrier owing such duty to the shippers. Especially so where, as here, the uncontradicted evidence is that everybody looking in the coal compartment of the vessel in the loading port observed that the dangerous condition existed, and that it was foolhardy for the respondent to send the vessel to sea with petitioners' cargo on board. Ignorance by anyone in the loading port interested in the vessel of such an obviously dangerous condition is inconceivable. Indeed, counsel for respondent themselves stress the obviousness of the danger by stating repeatedly that the vessel was actually on fire before she left the dock. The only excuse offered for respondent is that the managing officers were all in England, and that although doing business as a common carrier in New York through a subsidiary 100 per cent owned by it, and issuing bills of lading there to American shippers, it had made

no provision for a managing agent or inspector at New York to attend to its business of seeing to it that its vessel was not obviously unfit at the time of being permitted to go to sea with the cargo on board. Counsel for respondent attempt to dispose of respondent's 100 per cent-owned subsidiary (R. 343, 347) or "agent" at New York (R. 335, 343, 344, 351), by contending that it was only a "freight agent." Not only was the so-called agent merely the respondent itself in another guise, but the "Galileo" was alongside the subsidiary's dock at New York when Magarelli, standing on the coal boat also alongside the "Galileo," detected the strong odor of coal gas which respondent states indicated the fire had broken out (Respondent's brief, page 5). Consequently, even a "freight agent" on the dock could not remain ignorant of the dangerous gas. It is immaterial therefore which of the respondent's representatives in New York was the managing agent through whom it under its corporate name as a common carrier was doing business. Every person whatsoever visiting the dock or the vessel had knowledge or reasonable means of knowledge of the obviously dangerous gas or unseaworthiness. The respondent consequently is chargeable with that knowledge.

The first point in petitioners' brief is based squarely on the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. (2d) 232, at p. 234, that

> "It is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees."

and on the decisions of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. at p. 333, that

> "But for all damages legally attributable to the breach of warranty of seaworthiness, petitioners may recover."

and in *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, at p. 150, that the operator of a vessel

> "becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners."

and on the decision in *The Edwin I. Morrison*, 153 U. S. 199, at p. 215, that

> "The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure."

and on the decision in *The Caledonia*, 157 U. S. at p. 137, that

> "As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel."

Further in support of the first point in their brief, petitioners cited the decision of the Privy Council in *Royal Exchange* v. *Kingsley Navigation Co.*, 1923 Appeal Cases 235, at page 244, that

> "the ignition of the ship was the natural and direct cause of heat generated by such contact, with the result that the loss is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire within the protection of s. 7 (of the Canadian Water Carriage of Goods Act). The train of causation, from the unseaworthiness of the 'Queen City' to the outbreak of the fire, is unbroken, and as pointed out by Lord Shaw in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), A. C. 350, 369, the proximate cause of a loss is not necessarily the cause nearest in time."

The decision of the Circuit Court of Appeals in the present case is in conflict with all those decisions, and counsel for respondent nowhere in their brief have the temerity to contend that it is not so in conflict.

The first point in petitioners' brief to which respondent has not replied is supported by adequate citation of authorities at pages 16 to 53, inclusive. Moreover, all the decisions upon which the Circuit Court of Appeals relied in deciding against petitioners on that first point are distinguished and are shown to be inapplicable on the uncontradicted evidence. The District Court in its opinion stated the two points involved in substantially the same language as that used in petitioners' brief in this Court. The District Court said:

> "The libellants, however, contend that (1) as a matter of fact there was neglect by the owner in not maintaining such supervision as would have prevented or corrected the chief engineer's negligence, and (2) as a matter of law the negli-

> gence of the chief engineer is chargeable to the owner notwithstanding the distinction between the two in the statute" (R. 588).

The Circuit Court of Appeals in its opinion said:

> "The libellants attempt to attribute to the shipowner personal neglect contributing to the dangerous conditions which resulted in the outbreak of the fire * * *. Indeed if the respondent was under a duty to have the loading of coal inspected by anyone other than the ship's officers, it should have appointed a shore superintendent for that purpose" (R. 646).

This issue was the legal issue involved below. The determination of it by the Circuit Court of Appeals in a manner in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 Fed. (2d) 232, resulted in the present proceedings on certiorari. It is in no sense a question of fact but a question of law, as we have shown in petitioners' brief at pages 16 to 57.

The statement at page 8 of respondent's brief that: "In the Circuit Court of Appeals the parties agreed that the fire was the proximate cause of the loss (R. 642)", is wholly without support, either in the record or in fact. No agreement or concession whatever was made in the Circuit Court of Appeals with reference to fire being the proximate cause of the loss. Page 642 of the record, cited by respondent in support of its statement, is merely the page of the opinion of the Circuit Court of Appeals in which the statement

was made which was fully answered in the footnote at page 29 of petitioners' main brief, which is not mentioned by counsel for respondent in their brief. Indeed, the impression is sought to be given by respondent that there was some independent agreement other than that contained in the written stipulation which was filed in the District Court and in a part of the Record (R. 556). A similar misstatement appears at pages 2 and 3 of respondent's brief.

In the Circuit Court of Appeals we discussed that proposition under two headings: one at the beginning of our argument, the other at the end of our argument, as follows:

> "POINT I. The Court, having found that the condition of the 'Galileo' was such on sailing that fire was inevitable, and that this condition could have been ascertained on sailing, should have held as a matter of law that the fire originated as a result of the personal neglect of the respondent in failing to use diligence to make the ship seaworthy."
>
> "POINT VI. Libellants' losses were in consequence of unseaworthiness, and as the bill of lading provided that respondent should be liable for unseaworthiness where it failed to use due diligence to make the ship seaworthy, the respondent when it failed in that respect, breached its contract and *ipso facto* became liable because libellants' losses were caused by unseaworthiness and not by fire.
>
> 1. The libellants' loss was in consequence of unseaworthiness.
>
> 2. The fact that there was an intervening fire, does not make that fire the cause of the loss.

3*f*

> The cause of the loss was unseaworthiness.
>
> 3. The respondents are liable for all of libellants' losses because they resulted from unseaworthiness."

Respondent's position in the Circuit Court of Appeals was (we quote verbatim the First Point from its brief in that court):

> "First Point: The *proximate cause* of the loss of the 'Galileo' and her cargo was the negligence of Chief Engineer Oxtoby. For this reason all other circumstances injected into the case by appellants are immaterial." (Italics ours.)

We had specifically directed the Court's attention, at page 3 of our brief in the Circuit Court of Appeals, to the terms of the written stipulation (R. 554, 555) which the parties had entered into before the case was tried in the District Court. In its opinion the Circuit Court of Appeals said: "The parties agree that the fire was the proximate cause of the loss" (R. 642). As the stipulation constituted the only agreement between the parties, it never crossed our minds that the Court was doing otherwise than referring to the stipulation. In our brief in support of the petition for the writ of certiorari, we specifically called to this Court's attention the misapprehension which the Circuit Court of Appeals had of the terms of the stipulation (see pages 26 and 27 of our brief in support of the petition for certiorari). Respondent in its brief in opposition to the petition took no exception to our statement respecting the language of the Circuit Court of Appeals quoted above and did not so much as suggest that there

was any agreement of any kind other than that contained in the written stipulation (R. 554, 555). It now says for the first time (Respondent's Brief, page 8) that an entirely new agreement was made in the Circuit Court of Appeals and that this language used by the Court was based on a supposed new agreement. The Circuit Court of Appeals does not say when or where the agreement which it mentioned (R. 642) was made. Certainly, as the Court knew of the written stipulation in the record, if any new agreement had been made, the Court would have said so. Parties do not stipulate questions of law, they stipulate facts. And when the question of law alleged to have been stipulated was the issue on the appeal, as appears from the briefs of both parties, it is beyond our power of comprehension to understand how respondent can now say that the parties agreed that the fire was the proximate cause of the loss (Respondents' brief, p. 8).

Moreover, if any such new agreement had been made, it seems that the Circuit Court of Appeals went to unnecessary trouble in writing an opinion on the issue presented by Point I and Point VI in our brief in that Court, and by Point I of our opponent's brief in that Court. Obviously no agreement, oral or written, between the parties was made in the Circuit Court of Appeals, and our clear recollection is that there was no such agreement.

At pages 1 and 2 of respondent's brief the statement is made that the libel was "for loss and damage

to merchandise which occurred by reason or by means of a fire happening on the Steamship 'Galileo' in August, 1926." There is no reference to the record to support this statement, and when we turn to page 8 of respondent's brief, we find respondent saying: "Petitioners' libels merely alleged the shipment of cargo in good condition and the failure to deliver at destination." This latter statement is correct, with the addition that the libel alleged that the respondent was a common carrier.

The cases are collated in *Inland Waterways Corporation* v. *Hallet & Carey Co.*, 52 Fed. (2d) 13, at page 15, as follows:

> "The presumption was [at common law], in case of failure to deliver, that it [the carrier] was at fault; and the presumption was not rebuttable save as to the few exceptions, and the carrier had to prove itself within the exceptions. 4 Elliott on Railroads (2d Ed.) §1454; 10 C. J. p. 107, §129; 6 Am. & Eng. Encyc. of Law, p. 262; *Clark* v. *Barnwell*, 12 How. 272, 280, 13 L. Ed. 985; *The Niagara* v. *Cordes*, 21 How. 7, 22, 23, 16 L. Ed. 41; *Hall & Long* v. *Nashville & C. R. Co.*, 13 Wall. 367, 372, 20 L. Ed. 594; *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174, 181, 23 L. Ed. 872; *North Penn. R. Co.* v. *Commercial Bank*, 123 U. S. 727, 733, 8 S. Ct. 266, 31 L. Ed. 287; *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 509, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *The E. M. Norton* (C. C.), 15 F. 686. See *Chicago & E. I. R. Co.*, v. *Collins Produce Co.*, 249 U. S. 186, 192, 39 S. Ct. 189, 63 L. Ed. 552."

This was precisely the situation presented to this Court in *The Willdomino,* 272 U. S. 718, where as the record in that case in this Court shows, at pages 3 and 26, the libels were merely against a common carrier for nondelivery of the goods at destination. It is thus unimportant that there was no allegation of unseaworthiness in the libel. *The John H. Starin,* 191 Fed. 800, at pages 801, 802.

The statements in respondent's brief that the loading and carriage of the 850 tons of new coal which caused the fire was a routine duty of the chief engineer is not supported by citation of the record and is contrary to respondent's own uncontradicted evidence. The loading on the "Galileo" of the 850 tons of additional coal was in accordance with a peremptory cable issued personally by the managing officers of the respondent in Hull, England, to their New York subsidiary (R. 572, 572-A). The cable order specifically directed that all that coal was to be transferred to another steamer, the "Francisco," on arrival and delivery at destination. As the master of the "Galileo" testified (R. 277): "It is carried *as cargo* wherever you put it." (Italics ours.) There is no evidence that any of that coal was to be used by the chief engineer on the "Galileo." The New York subsidiary itself employed shore stevedores and longshoremen to do the loading of the coal. The evidence is uncontradicted that the chief engineer, Oxtoby, had no authority or jurisdiction whatever to use any of that coal in the furnaces

of the "Galileo" in the performance of any of his usual duties (R. 325). Nor did any of the engine-room or fireroom crew under Oxtoby have any right to use that coal. It was, as the master testified, "cargo" (R. 277). Its carriage and handling were therefore entirely outside the usual scope of the duties of either Oxtoby or any of his assistants. The cable order from respondent's managing officers at Hull was not directed to Oxtoby and there is no evidence that he was authorized to countermand it or was authorized by respondent to incur the expense of removing or shifting the "Galileo's" own bunker coal so that the additional cargo of coal could be carried for some other vessel.

The master of the "Galileo" testified that after Mr. Sanderson, the President of Ellerman's Wilson Line, New York, Inc. (R. 336), received the order from Hull to purchase the coal, the coal was purchased by Mr. Sanderson (R. 284). The coal was actually loaded on board by stevedores employed by Mr. Sanderson (R. 284), and was trimmed into the ship by trimmers employed by Mr. Sanderson (R. 285). The chief engineer himself here testified that this 850 tons of coal for the "Francisco" was not within his requirements as chief engineer of the "Galileo," but that the coal was ordered by Ellerman's Wilson Line, New York, Inc. (R. 325), who were the respondent's shore agents (R. 325).

Quite the contrary is the case with bunker coal for the "Galileo" according to respondent's witness Neale, the Vice President of Ellerman's Wilson Line, New York, Inc. (R. 337). Mr. Neale testified that the New York office has nothing to do with the shipping of such coal when it is required; that the chief engineer has au-

thority to require the amount of coal needed for the ship's use (R. 337); and that the New York office gives no instructions in such case (R. 337).

The respondent's own uncontradicted evidence in the present case therefore is that when the owners at Hull decided to carry on the "Galileo" the 850 tons of coal which the courts below held caused the fire, they did not even confer or communicate with Chief Engineer Oxtoby but issued their order directly to their New York subsidiary, who in turn, without consulting Oxtoby, employed shore stevedores and longshoremen to do the loading, and that such stevedores proceeded with the loading until the dangerously unseaworthy condition made normal continuance of their work impossible. On such evidence, we submit, it is simply preposterous for counsel for respondent to contend that it was "a usual and simple duty of a chief engineer" such as Oxtoby (Respondent's brief, page 40) to load and carry that 850 tons of coal. Indeed, as already indicated, the master of the "Galileo" testified that that 850 tons was being carried not as bunkers for the "Galileo," but "as cargo." Even more reprehensible is the following statement at page 40 of respondent's brief: "The owners of the 'Galileo' had appointed a competent chief engineer to supervise the coal. Such supervision is a usual and simple duty of a chief engineer. *Walker* v. *Transportation Co.*, 3 Wall. 150. No special skill was required for such a routine matter, as petitioners admit in their brief, p. 40. The owner, therefore, selected a competent person to perform a usual and simple duty." A reference to

page 40 of petitioners' brief shows that that entire page is devoted to a statement of the facts in the *Walker* case and not in the present case, and that the statement as to the routine duty as to banking of fires in the *Walker* case, was clearly made as distinguishing the *Walker* case from the present case, for in the *Walker* case no unseaworthiness was involved, and there was no failure of the shipowner to make his ship seaworthy at the time of sailing.

The "concessions" alleged at pages 3, 6, 9 and 40 of respondent's brief have never been made. They are not in the record or briefs, and no citation or reference is given to support them. Indeed, the concurrent findings are to the contrary (R. 588, 586, 642).

At page 45 of respondent's brief it is stated that the terms of the bills of lading are immaterial under the Limited Liability Statute. That contention is self-defeating, because if that were so the respondent would be precluded from relying on the term in the bill of lading reducing the implied absolute warranty of seaworthiness to a warranty of seaworthiness so far as due care by an ordinarily prudent shipowner in the loading port could make her so.

Respondent refers to our contention regarding the meaning of the decision in *The Malcolm Baxter, Jr.*, 277 U. S. 323, as contrary to all previous decisions.

We need not go further than a case cited by the Circuit Court of Appeals below. *Lord* v. *Goodall,* 4 Sawyer 323. In that case the court expressly stated that it was the duty of the shipowner to see that the ship when she sails is in a seaworthy condition and that a breach of this duty constitutes privity and knowledge. See our main brief at page 43 for the exact language of the court. Such also is the doctrine in *The Edwin I. Morrison* 153 U. S. 199; *The Caledonia,* 157 U. S. 137, and *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139.

It is repeatedly stated by respondent in its brief that in *The Malcolm Baxter, Jr.,* in the District Court, now reported 55 Fed. (2d) 312, the court found that no competent person was called in to examine the "Baxter" before she sailed from New Orleans. Not only was the master of the vessel there to inspect her, but a Captain Thompson, whose qualifications were in no way criticised, also examined the vessel on behalf of the owners, as did a surveyor of the New Orleans Board of Underwriters (*The Malcolm Baxter, Jr.,* 55 Fed. 2d., at p. 315). The respondent in that case did much more than did the respondent here. When *The Malcolm Baxter, Jr.,* case came before this Court, the facts were fully understood and stated in this Court's opinion (*The Malcolm Baxter, Jr.,* 277 U. S., at page 332). The statement contained in respondent's brief that the owners of the "Baxter" received a letter from the captain while the vessel was at Port Eads is wholly without support. All that the District Court says in this connection is that the captain wrote such

a letter. There was no evidence that the letter was received by the shipowner in New York, either before the "Baxter" sailed from Port Eads or at any time thereafter, and indeed Port Eads was an intermediate port, the loading port, New Orleans, having been left several days before. The captain in his evidence merely said:

> "Q. While lying at Port Eads did you communicate with the French Overseas Corporation?
>
> A. I remember writing them a letter.
>
> Q. Do you remember where that letter was addressed?
>
> A. It was addressed to 120 Broadway, New York City.
>
> Q. Do you remember when you wrote that letter?
>
> A. A few days after I arrived at Port Eads.
>
> Q. Do you remember what you stated in the letter?
>
> A. I cannot recall exactly what I stated. I mentioned the fact that I had discovered a leak and if it developed anything serious not to be surprised to see us in another American port, that I was too far down then to undertake to go back to New Orleans and I thought it would be advisable to see what developed."
>
> (See the record in *The Malcolm Baxter, Jr.*, No. 459, October Term, 1927, at pp. 205, 206.)

The quotation from 55 Fed. (2d) 316, on page 39 of respondent's brief, is absolutely all that the District Court said or could say with respect to the letter which the captain wrote. *On page 39 of respondent's brief, the*

paragraph following the quotation from Judge Knox's opinion, purporting to state additional facts, is not supported in any way by the record or by any finding made in The Malcolm Baxter, Jr., case. We were counsel in that case and have carefully checked the record. There is nothing in *The Malcolm Baxter, Jr.* case to show that any notice was brought home to the owners that the vessel was unseaworthy, and consequently, the statement that the owners did nothing after such notice and for this reason the ship was properly condemned, is a clear misapprehension by respondent's counsel of the facts as shown by the record and opinions in that case. It is noteworthy that the respondent gave no citation of either the record or the opinion in that case to support those statements of alleged facts. These statements are clearly opposed to the statement of facts given by this Court and by the Circuit Court of Appeals and the District Court in the *Baxter* case. This statement is repeated in respondent's brief at the bottom of page 39. But here also we find no reference by respondent's counsel to support their statement as to these alleged facts.

At the bottom of page 39 of respondent's brief it is stated that the lack of diligence which Mr. Justice Stone "was talking about in his opinion in a non-technical sense was the personal conduct and personal knowledge of the owner in the *Malcolm Baxter* case which amounted in law to the privity and knowledge required by the statute." When we examine the findings of fact of the District Court, in that case, which were concurred in by this Court, we find that this is

not what the District Court held. The District Court says:

> "In my opinion it was of the essence of the present contracts of affreightment that the 'Baxter' was, when the contracts were made, able to perform her undertaking. It was not the agreement that the vessel should *thereafter* become able to go forward. If such were the case the effect would be that claimants assumed all the risk incident to petitioners' efforts to make good its contract. This, I think, claimants were not called upon to do.
>
> Having found the breach of warranty as to seaworthiness to have been an effective and continuing cause of frustration, there is no reason, that I can see, why petitioners should be relieved of liability merely because an additional cause of frustration intervened. The last cause was only incidental to the first." 55 Fed. (2d) at page 316.

It is obvious from Judge Knox's opinion, and we find nothing in either the opinion of the Circuit Court of Appeals or in the opinion of this Court in the *Baxter* case to in any way qualify it, that the failure of the shipowner to use due diligence to make his ship seaworthy, constituted such neglect as to preclude him from claiming the privilege granted by the Limitation Act in so far as damages flowing from the unseaworthiness were concerned. Indeed in this Court's decision in *The Malcolm Baxter, Jr.*, 277 U. S. 323, this Court said: "But for all damages legally attributable to the breach of warranty of seaworthiness petitioners may recover."

At pages 10 and 19 of respondent's brief, it is stated that the steamer "Lexington" involved in the case of *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, was unseaworthy, and that the fire was an inevitable consequence of the unseaworthiness. We submit that those statements are wholly unwarranted by the facts in that case. The "facts" of that case as stated on page 18 of respondent's brief, are not supported by citation of pages of the printed report and are obviously taken from that part of the pleadings in that case which this Court did not find was established by the evidence. Moreover, it appears from the opinion in that case that the facts were as follows:

> "There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and along side of the boiler-deck, and around the steam-chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton around the chimney extended from the boiler to within a foot of the upper deck.
>
> "The fire broke out in the cotton next the steam-chimney, between the two decks, at about half past seven o'clock in the evening, and was discovered before it had made much progress. *If the vessel had been stopped, a few buckets of water, in all probability, would have extinguished it. No effort seems to have been made to stop her, but, instead thereof, the wheel was put hard-a-port, for the purpose of heading her to the land.* In this act, one of the wheel-ropes parted, being either burnt or broken, in consequence of

> which the hands had no longer any control of the boat." (Italics ours.)

This Court did not find that the dangerous condition of the vessel could not have been remedied by the crew after sailing, such as would constitute unseaworthiness as defined by this Court in *International Navigation Co.* v. *Farr*, 181 U. S. 218, but in the italicized words in the quotation found just the contrary. To emphasize this finding, this Court said (6 How. 344, at pages 384 and 385):

> "It is, indeed, difficult, on studying the facts, to resist the conclusion, that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested."

We refer to page 33 of our main brief for what was said in this connection by the House of Lords in *Paterson, Zochonis & Co.* v. *Elder Dempster & Co.*, L. R. 1924 Appeal Cases 522, at page 548. In the *Lexington* case, even if the vessel should be considered unseaworthy, the damage complained of would not have happened but for the negligence of the ship's officers at sea in failing to remove the cargo and in failing to put out the fire with a few buckets of water, as should have been done. The uncontradicted evidence in the present case is that the seat of the fire could not be reached on the "Galileo" without shore assistance (R. 62).

Much reliance is placed on the *Walker* case by the respondent, but we have fully dealt with this case and the other cases relied on by the Circuit Court of Appeals in our principal brief. We note from respondent's brief that there is no attempt made to criticize the distinctions which we have drawn between the present case and the cases cited by the Circuit Court of Appeals in support of its opinion. Indeed counsel apparently accepts those distinctions by citing an entirely different set of cases (at page 29 of respondent's brief) to sustain the decision below.

At page 28 of respondent's brief, respondent says:

> "The petitioners, throughout all courts, including this one, have attempted to deal with this case as if the owner were relying on the Harter Act instead of on the Fire Statute."

Our brief may be searched from end to end without finding any support for this statement.

At page 31 of respondent's brief, respondent says:

> "The petitioners have printed in their brief long extracts from opinions in cases involving the Harter Act, without pointing out to the court the vital differences between the two statutes."

Only two cases quoted by us involved the Harter Act:

(1) *The Wildcroft*, 201 U. S. 378 (Petitioners' brief, page 27). Our main brief shows that the "Wildcroft" opinion was quoted to show the general duty of a ship-

owner imposed by maritime law. In our reply brief in the Circuit Court of Appeals we specifically called respondent's attention to the fact that the Harter Act imposed no duties, and that it merely limited the shipowner's right to contract and granted the shipowner certain exemptions subject to condition; and we further stated that it was the respondent and not ourselves who was confusing the Harter Act with the general duty imposed by maritime law.

(2) *The Carib Prince,* 170 U. S. 655 (see page 51 of petitioners' brief). In that case this Court took occasion to reiterate in strong terms what it had previously said in *The Caledonia,* 157 U. S. 124, which was not a Harter Act case, as to the shipowner's duty to make his ship seaworthy under the general maritime law. The quotation deals only with that statement by this Court. These quotations are short and in no way sustain respondent's statement.

Quinlan v. *Pew,* 56 Fed. 111, seems to be the case relied upon by respondent, but that case and the cases following it have long since been overruled, as was pointed out by Judge Hutcheson in *The Etna Maru,* 20 Fed. (2d) 143, by the decision of this Court in *Pendleton* v. *Benner Line,* 246 U. S. 353. Moreover *Quinlan* v. *Pew* did not even involve a contract of affreightment.

Moore v. *American Transportation Co.,* 24 How. 1, cited by respondent, did not deal in any sense with the question with which we are confronted here. That

case merely dealt with whether or not the Limitation Act of 1851 was applicable to vessels trading on the Great Lakes. The court made no attempt to decide any other question than that, and a careful reading of *Moore* v. *American Transportation Company* does not indicate that there was any question with respect to seaworthiness of the vessel on sailing.

Only two recent cases are cited in the long list of cases cited on page 29 of respondent's brief. They are *Kitsap County Transportation Co.* v. *Harvey,* 15 Fed. (2d) 166, and *American-Hawaiian S. S. Co.* v. *Pacific S. S. Co.,* 41 Fed. (2d) 718.

Kitsap County Transportation Co. v. *Harvey,* 15 Fed. (2d) 166, did not involve a contract of affreightment at all, but was a suit by a passenger for a personal injury, and the defendant shipowner was held liable for negligence.

American-Hawaiian S. S. Co. v. *Pacific S. S. Co.,* 41 Fed. (2d) 718, did not involve a contract of affreightment but was a case of collision between two steamers. No question of the liability of a common carrier in any aspect was involved.

Respondent's argument on pages 51 to 58 of its brief is wholly irrelevant, because it deals entirely with a question of waiver, which is not involved here at all, as we pointed out emphatically in our petition and brief for certiorari and in our reply brief in support of the petition for certiorari. In the present case petitioners make no claim of waiver, and notwith-

standing we clearly pointed this out in our petition and brief for certiorari, and in our reply brief in support of that petition in this court, counsel for respondent again devote pages of their brief to that irrelevant point. Under the circumstances we do not think their extended argument on that point merits further reply.

The *D'Utassy* case cited at page 52 of respondent's brief involved only a pleading alleging a "waiver," and is therefore entirely irrelevant. Furthermore the facts in the *D'Utassy* case (*D'Utassy* v. *Mallory Steamship Co.*, 162 A. D. 410), as stated by counsel for respondent are misleading. No question of unseaworthiness was involved in that case, and neither court makes any finding with reference to the lighter or vessel being unseaworthy or with reference to negligence of the vessel owner in connection with unseaworthiness. The case is wholly inapplicable to the present facts.

All that was decided in *D'Utassy* v. *Mallory Steamship Co.*, 162 A. D. 410, was:

> "The respondent relies on the last sentence quoted from said section 9, and contends that the effect thereof is to waive the Federal statutory exemption from liability for fire on a lighter in a harbor, occurring without its design or neglect, and to make the liability of a carrier by water for freight in such case governed by provisions of section 1 of the bill of lading." 162 A. D. at page 414.)
>
> "The appellant, on the other hand, contends that the only purpose of said sentence in section 9 was to make the liability of a carrier by rail for damages to freight on a lighter em-

ployed only incidentally in the course of its transportation the same as if the damages were caused while the freight was on a car, and thus to render its liability uniform throughout its transportation. That construction is indicated by the provision in section 3 which continues the carrier's liability as a railroad carrier even though it becomes necessary for it to carry by water; and I am of opinion that it is the proper construction of the bill of lading, and that it was not the intention of carriers by water to stipulate away their Federal statutory exemption from liability." (162 A. D. at page 415.)

Respondent labors for several pages (pages 31, 32, 33, 34) in its brief to maintain the position, taken by it and adopted by the Circuit Court of Appeals in its opinion, that *The Etna Maru,* 20 Fed. (2d) 143, affirmed 33 Fed. (2d) 232, was affirmed on a different ground from that upon which it was decided in the trial court. At the end of the discussion, however (near the top of page 34 of respondent's brief), it is forced to admit that our statement of the matter in our main brief (p. 19) is correct, and that all that the Circuit Court of Appeals for the Fifth Circuit did when it affirmed *The Etna Maru* decision was to hold that the Fire Statute was not applicable. The assumption elsewhere by respondent that the court decided that the Limitation Act did not apply is unfounded. All that the Circuit Court of Appeals for the Fifth Circuit said was (33 Fed. (2d) at p. 234):

"It is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted

to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against the ship."

The statements in the second paragraph on page 40 of respondent's brief are inaccurate. We have never suggested that the words "privity and knowledge" have been removed by judicial legislation. We have, in our main brief (at pp. 63 and 64), quoted at length from the opinion of Judge Addison Brown in *Gokey* v. *Fort*, 44 Fed. 364, at p. 366. Judge Brown there shows that the limitation statute has never had any application to a shipowner's "own personal obligation". It is respondent, not petitioners, who asks this Court to change the law. See *Lord* v. *Goodall*, 4 Sawyer 292. (See also petitioners' main brief, at page 41.)

The case of *Arkell & Douglass* v. *United States*, 13 Fed. (2d) 55, from which respondent quotes, obviously did not involve any warranty of seaworthiness because the negligent act was committed at Galveston, long after the vessel had left her loading port. We pointed this out at pages 44 and 45 of our main brief.

We have reviewed in our main brief the other cases cited in respondent's brief (see petitioners' brief, pages 34 to 40).

A tabulation appears on page 43 of respondent's brief, evidently for the purpose of suggesting that our statement that most of the cargo was carried under bill

of lading Form A is incorrect. That our statement is correct is established by the fact that the list or statement of shipments annexed to the libel shows that all of the grain cargo was carried under Form A (R. 50A). See also Libellants' Exhibit 13 (R. 542B), stowage plan, which shows the lower holds of the ship filled with the grain (about 140,000 bushels) all of which was carried under that Form A. Numerous other lots of cargo were also carried under the Form A bill of lading. It was stipulated by the parties (R. 555) that the statement or list of shipments annexed to the libel as an exhibit (at R. 50A) listing the cargo shipped on the S. S. "Galileo" is correct, excepting the items noted in the stipulation. In referring to Earle & Stoddart and Sanday & Co. in our brief below we relied on this stipulation, and merely mentioned these two typical shippers of cargo under bill of lading Form A to avoid burdening the Court with unnecessary detail.

At page 13 of respondent's brief it is stated that

> "The petitioners did not contend in the District Court that any of the bills of lading were 'personal' contracts." (R. 591.)

But see R. 590, where the District Court, in its opinion states that the petitioners did make such contention as follows:

> "Libellant's contention that respondent is liable for the loss, even though it was caused solely by the negligence of the chief engineer, is based on the theory that *respondent was under*

> *a contractual obligation to the shippers* that reasonable care be exercised by all concerned to make the vessel seaworthy before she left port. It is not contended that the doctrine of *respondeat superior* makes respondent liable, but that the negligence of the chief engineer *caused a breach of contract on the part of the owner.*" (Italics ours.)

And see the opinion of the Circuit Court of Appeals (R. 647) that

> "It is urged that the bills of lading issued to Earle & Stoddart, Inc. and to Sanday & Co. *were the personal contracts of the respondent to which the limitation acts do not apply.*" (Italics ours.)

Again at page 9 of respondent's brief it is said:

> "The petitioners made no claim in the District Court that the bills of lading constituted 'personal' contracts containing 'an express warranty of seaworthiness'."

The fact is that in the petitioners' brief in the District Court, that claim was made as follows:

> "There was a contractual warranty by the respondent in each of these bills of lading that it would in fact use due diligence at New York to make the 'Galileo' seaworthy before sailing on this particular voyage. The language selected and used by the respondent itself in its printed bills of lading (which are annexed as exhibits to the libel) is that:
>
> [The bill of lading clause is then quoted.]
>
> "We call the especial attention of the court to the following part of the clause which we

just quoted: 'It is mutually agreed that * * * the carrier shall not be liable as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after or during or while waiting, loading * * * by * * * unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, *provided the owners have exercised due diligence to make the steamer seaworthy.*' (Italics ours.) The Supreme Court of the United States and the other Federal courts have repeatedly held that such a contractual warranty by a shipowner that he will actually use due diligence to make a vessel seaworthy before sailing, cannot be delegated by the shipowner to any one else; it must actually be complied with or else the shipowner has breached his contract. [Citing numerous cases.] Moreover, the bills of lading are signed by agents of the respondent (Ellerman's Wilson Line, Ltd. by Ellerman's Wilson Line, New York, Inc., as Agent) so that the contract is a personal one by the respondent, a breach of which is a breach of a shipowner's personal contract constituting 'neglect' of the shipowner personally, as that term is used in the Fire Statute. A recent case on this point reviewing the decision of the Supreme Court of the United States, is *The Etna Maru*, 1927, American Maritime Cases, 1142, 1146, 1148, (affd. 1929 A. M. C. 1119—C. C. A. 5; certiorari denied, U. S. Sup. Ct., October Term 1929), in which the United States District Court for the Southern District of Texas said:"

[Extensive quotation is then made from the opinion in the *Etna Maru* case, including quo-

tations from the decisions in *Benner Line* v. *Pendleton* and in *The Caledonia,* 157 U. S. 124.]

Again in petitioners' brief in the District Court it was claimed:

> "The contract was a personal one of the respondent; and it is, therefore, at fault personally for the breach of it, under the decisions in *Benner Line* v. *Pendleton, The Poleric* and *The Etna Maru,* irrespective of whether or not it personally committed any act in connection with the breach."

Indeed, both courts below discussed *The Etna Maru,* 20 Fed. (2d) 143 and *The Etna Maru,* 33 Fed. (2d) 232, cited in our briefs in the respective courts. The chief authority relied upon in *The Etna Maru,* 20 Fed. (2d) 143, was *Pendleton* v. *Benner Line,* and one of the chief authorities relied upon by the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 Fed. (2d) 232, was *Luckenbach* v. *McCahan Sugar Co.,* 248 U. S. 139. The ground of conflict between the two circuits which exists as a result of the decision of the court below in the present case necessarily involves a repudiation of the statement contained in respondent's brief and of the doctrine announced by this Court in *Pendleton* v. *Benner Line* and in *Luckenbach* v. *McCahan Sugar Co.*

The statement at page 12 of respondent's brief that

> "Petitioners' attempt to invoke here for the first time the doctrine laid down in *Pendleton*

v. *Benner Line*, 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139"

is incorrect, not only because of the foregoing quotation from petitioners' brief in the District Court, but also because the petitioners made the further claim in their printed brief in the Circuit Court of Appeals as follows:

> "POINT V. The failure of respondent to deliver some of the goods lost and damaged on the 'Galileo' was a breach of a personal contract; to the liability so created the statutes do not apply. * * * In so far as the Earle & Stoddart shipments and the Sunday shipments are concerned, however, the statutes can have no application because the liability of the shipowner rests upon personal contract. These bills of lading are all signed 'Ellerman's Wilson, Line, Ltd., by Ellerman's Wilson Line, Inc.,' its 100% owned subsidiary, such bills constituting a personal contract. See *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139. In that case, at page 149, the court said:
>
> 'But the liability of the owners sought to be enforced here is one resting upon their personal contract; to such liability limitation acts do not apply.'
>
> The liability therefore of the shipowner for these shipments cannot be disputed in any event.
>
> POINT VI. Libellant's losses were in consequence of unseaworthiness, and as the bill of lading provided that respondent should be liable for unseaworthiness where it failed to use due diligence to make the ship seaworthy, the respondent, when it failed in that respect, breached

his contract and *ipso facto* became liable because libellant's losses were caused by unseaworthiness and not by fire. * * * In order to hold that the provision exempts the shipowner from liability for unseaworthiness when a fire intervenes, the court must hold that a shipowner is under no obligation to make his ship seaworthy in respect to a fire. In the instant case the shipowner has expressly agreed to be liable, without reservation, for losses due to unseaworthiness, even when a fire intervenes. * * * Indeed, no other conclusion is possible under the decisions of the Supreme Court in the *G. R. Booth*, and in the *Malcolm Baxter, Jr., supra*. Moreover, it is well settled here 'that the obligation to furnish a seaworthy vessel should not be held to be contracted away by implications'. *The Caledonia*, 157 U. S. 124. Especially is this true when the shipowner in its own contract has differentiated between losses caused by fire and losses caused by unseaworthiness. See bill of lading clause (appendix 3) where loss from fire and loss from unseaworthiness are dealt with separately."

Respectfully submitted,

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel for Petitioners.